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No. 98-640

In The

Supreme Court of the United States

October Term, 1998

BERTRAM ROBERTS and HANNI ROBERTS,

Petitioners,

vs.

FLORIDA POWER & LIGHT COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Do the federal regulations allowing radiation exposure within the Federal Permissible Dose Limits define the duty owed in a federal "public liability action?"

Yes, as virtually every court to address the question has concluded. More importantly, this Court has already denied certiorari on this precise issue. *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090 (7th Cir. 1994), *cert. denied*, 114 S. Ct. 2711 (1994). In the four years since that denial of certiorari, no Circuit Court of Appeals has reached a contrary conclusion. Thus, there is no reason for review.

Contrary to the Petition for Writ of Certiorari, there is no overlap between this question presented and the questions of tribal court sovereignty and comity presented by the writ of certiorari in *El Paso Natural Gas Company v. Neztsosie*, 136 F.3d 610 (9th Cir. 1998), *cert. granted*, 67 U.S.L.W. 3024 (U.S. Oct. 13, 1998) (No. 98-6). Price Anderson does not directly address tribal court jurisdiction. The jurisdiction of tribal courts over a federal cause of action will be determined by application of existing principles of comity to the interpretation of the phrase "original jurisdiction" in 42 U.S.C. § 2210(n)(2) and is totally unrelated to the duty owed in a public liability action, which is determined by an application of the total preemption of nuclear safety issues to the interpretation of the phrase "unless inconsistent with" in 42 U.S.C. § 2014(hh). Existing principles of comity are explained in the general rule and the two exceptions to the general rule set forth by this Court in *Montana v. United States*, 450 U.S. 544, 565-66 (1980). Thus, "substantial overlap" does not exist between these very different legal concepts applied to different statutory language.

STATEMENT PURSUANT TO RULE 29.6

The petition accurately lists the parties to the proceeding.

The parent company to Respondent Florida Power & Light Company is FPL Group, Inc. Nonwholly owned subsidiaries of Respondent Florida Power & Light Company are FPL Services, JEA 500 kv Transmission Line, Robert W. Scherer Electric Generating Plant — Unit #4, and St. Johns River Power Park.

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Appendix A — Statutory And Regulatory Provisions Involved 1a

OPINIONS AND JUDGMENTS BELOW

The opinion of the Court of Appeals is reported at 146 F.3d 1305 (11th Cir. 1998). The District Court's ruling is reported at 1997 WL 382035 (S.D. Fla. June 9, 1997). Both opinions are contained in the Petitioner's appendix.

STATUTORY PROVISIONS INVOLVED

The provisions of 42 U.S.C. §§ 2012, 2014, and 10 C.F.R. § 20.101 are involved in this case and are set forth in their entirety in Respondent's Appendix at 1a. 42 U.S.C. § 2210 is set forth in full in the Petitioners' Appendix at 16a.

STATEMENT OF THE CASE

A. The Nature of the Present Litigation.

This is a public liability action (PLA) arising under the Price-Anderson Act as amended by Pub. L. No. 100-408, 102 Stat. 1066 (1988) (the "Amendments Act") (codified in scattered sections of 42 U.S.C.), an integral part of the Atomic Energy Act. 42 U.S.C. § 2011 *et seq*. The Amendments Act creates original federal jurisdiction over any claim of injuries allegedly caused by exposure to specified nuclear material. 42 U.S.C. § 2014(hh). The Petitioner, Bertram Roberts, was an occasional contract nuclear worker who developed Chronic Myelogenous Leukemia (CML) four years after he retired. Petitioners filed a complaint asserting negligence, strict liability, and loss of consortium under Florida law. The complaint does not allege, and at no time in this litigation have Petitioners ever maintained, that Mr. Roberts received any occupational radiation exposure above the amounts specifically permitted by federal standards promulgated by the Nuclear Regulatory Commission (NRC) and specifically titled "Permissible Doses." 10 C.F.R. § 20.101. Thus, the precise

question presented is whether the duty owed to a nuclear worker by a federal licensee, who is required to obey federal permissible dose regulations as a condition of that licence, is established by compliance with those federal permissible dose regulations.

B. Course of the Proceedings and Disposition Below.

This action was commenced in state court and was removed on November 13, 1995 to the United States District Court for the Southern District of Florida pursuant to the removal provisions of the Amendments Act. 42 U.S.C. § 2210(n)(2). Florida Power & Light (FPL) timely filed a FED. R. CIV. P. 12(b)(6) motion to dismiss because the complaint failed to plead a PLA as required by § 2014(hh), the only cause of action available under the Price Anderson Act. The complaint failed to allege essential elements of a PLA: a radiation exposure in excess of the federal permissible dose limits for a PLA based on negligence, or an offsite exposure from an "event" that has been declared to be an extraordinary nuclear occurrence ("ENO") by the Nuclear Regulatory Commission, for a PLA based on strict liability.

On June 9, 1997, Judge Lenore Nesbitt entered an Order granting the motion to dismiss. The court framed the issue before it as follows:

> [W]hether federal safety regulations, and particularly federal radiation dose standards, establish FPL's sole duty of care for negligence, strict liability, and loss of consortium claims. In other words, the Court must determine whether liability is precluded in the absence of a violation of federal radiation dose standards.

Roberts v. Florida Power and Light Co., 1997 WL 382035 (S.D. Fla. June 9, 1997).

Judge Nesbitt examined Congress' enactment of the Atomic Energy Act and the Price Anderson Act "in the context of the entire federal statutory scheme of nuclear power" including the permissible dose limits for nuclear workers. *Id.* Noting that all published decisions, "including three Circuits of the United States Court of Appeals . . . have concluded that federal safety regulations conclusively establish" the duty owed in a PLA, the court determined that "there can be no liability in the absence of a violation of federal standards." *Id.* at *7. The court further determined that the federal regulations establishing the dose limits " 'must provide the sole measure of [FPL's] duty in a public liability cause of action.' " *Id.* (*quoting O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1105 (7th Cir. 1994), *cert. denied*, 114 S. Ct. 2711 (1994)). Accordingly, the court dismissed the complaint, holding:

> Petitioners have failed to allege that FPL breached its duty of care by permitting Plaintiff . . . to be exposed to an amount of radiation in excess of federally defined permissible dose standards, Plaintiffs have failed to state causes of action for negligence, strict liability, and loss of consortium.

Id. at *9.

Petitioners filed timely notices of appeal on July 2, 1997. The United States Court of Appeals for the Eleventh Circuit affirmed the District Court holding:

> Virtually every federal court to consider the issue, including three circuit courts of appeals, have held that "federal regulations must provide the sole measure of the defendants' duty in a public liability cause of action." . . . This is because "any state duty would infringe upon pervasive federal regulations

> in the field of nuclear safety, and thus would conflict with the federal law." . . . Moreover, the federal statutory scheme limits the liability of operators of nuclear power facilities and provides for indemnification but does so against a stringent regulatory background. Therefore, as the Seventh Circuit Court of Appeals noted, "[i]mposing a standard of care other than the federal regulations would disturb the carefully crafted balance between private involvement and safety that Congress has achieved." [citation omitted] Consequently, we join those courts in holding the federal safety regulations conclusively establish the duty of care owed in a public liability action.

Roberts v. Florida Power and Light Co., 146 F.3d 1305, 1308 (11th Cir. 1998) (citations omitted).

C. The Public Liability Action Under The Atomic Energy Act, As Amended By Price-Anderson Act.

In 1954, with the passage of the Atomic Energy Act, Congress ended the legal monopoly of the federal government over production and use of nuclear fuels. Congress' purpose in doing so was "to encourage widespread participation in the development and utilization of atomic energy for peaceful purposes. . . ." 42 U.S.C. § 2013(d). However, it quickly became apparent that private investment would not be forthcoming if there were no limits on potential liability. S. Rep. No. 296, 85th Cong., lst Sess. 1, *reprinted in* 1957 U.S. Code Cong. & Admin. News 1803. The Price-Anderson Act, a 1957 amendment to the Atomic Energy Act, was designed

> to remove the economic impediments in order to stimulate the private development of electric energy

> by nuclear power while simultaneously providing the public compensation in the event of a catastrophic nuclear incident.

Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 83 (1978).

Congress mandated that licensees of commercial nuclear power reactors be capable, through private insurance or by other financial means, of responding to claims for damages arising out of a nuclear incident, up to federally specified limits. 42 U.S.C. § 2210(b). "Nuclear incident" was defined to cover any injuries "arising from the special dangerous properties" that made nuclear risk a subject of federal regulation. S. Rep. No. 296, 85th Cong., 1st Sess. 16, *reprinted in* 1957 U.S. Code Cong. & Admin. News at 1817; *see* 42 U.S.C. § 2014(q).

The 1957 Price Anderson Act has been amended in 1966, 1975 and 1988. *O'Conner*, 13 F.3d at 1095. In 1966 Congress created federal court jurisdiction for all claims arising out of an extraordinary nuclear occurrence (ENO).[1] In 1988, in the

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1. An ENO is an extraordinary nuclear occurrence which is defined as

> any event causing a discharge . . . of [nuclear material] . . . offsite, or causing radiation levels offsite which the [NRC] determines to be substantial, and . . . determines has resulted or will probably result in substantial damages to persons offsite or property offsite.

42 U.S.C. § 2014(j); *see also O'Conner v. Commonwealth Edison Co.*, 748 F. Supp. 672, 675 (C.D. Ill. 1992), *aff'd*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 114 S. Ct. 2711 (1994) (ENO is determined by NRC only when substantial levels of radioactive materials have been discharged offsite); *McLandrich v. Southern California Edison Co.*, 942 F. Supp. 457, 465 (S.D.

(Cont'd)

Amendments Act, Congress created a new federal cause of action for a nuclear incident that does not rise to the level of an ENO. Congress adopted a national policy of uniform treatment for all persons injured in a nuclear incident. *See* H.R. Rep. No. 104, 100th Cong., lst Sess., pt. 1, at 18 (1987) ("desire of Congress for equitable and uniform treatment of victims of a nuclear accident"). The Amendments Act creates an exclusively federal cause of action, the "public liability action," which encompasses "any suit asserting public liability," 42 U.S.C. § 2014(hh);[2] confers original and removal jurisdiction for public liability actions arising out of a given nuclear incident on a single federal district court — the district court in the district where the nuclear incident occurred, *Id.*, 42 U.S.C. § 2210(n)(2); and directs that the new federal "substantive rules for decision" in public liability actions "shall be derived from the law of the State in which the nuclear incident involved occurs" unless the state law is "inconsistent" with the Act. 42 U.S.C. § 2014(hh).

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Cal. 1996); *Bohrmann v. Maine Yankee Atomic Power Co.*, 926 F. Supp. 211, 218 (D. Me. 1996). The 1988 Amendments Act created is own form of strict liability when there is an ENO. 42 U.S.C. § 2210(n)(1); *In re TMI Cases Consolidated II*, 940 F.2d 832, 852 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992); *O'Conner*, 748 F. Supp. at 675 (waiver of defenses is only applicable to ENO and not to normal nuclear incidents).

2. "Public liability" is separately defined as "*any* legal liability arising out of or resulting from a nuclear incident . . ." 42 U.S.C. § 2014(w) (emphasis added).

REASONS FOR DENYING THE WRIT

A.

THE DUTY OWED ISSUE DOES NOT WARRANT REVIEW.

1. The Decision Below is Not in Conflict With Any Other Court of Appeals Decision or with any Supreme Court Decision and Correctly Applied Longstanding Supreme Court Precedent on the issue of Federal Preemption of Nuclear Safety.

The four appellate courts that have addressed this issue all agree that since this Court firmly held in *Pacific Gas & Elec. Co. v. State Energy Conservation and Dev. Comm'n*, 461 U.S. 190 (1983) that the entire field of nuclear safety has been preempted, the standard of care in a PLA must be determined by the federal numerical permissible dose limits for workers and members of the general public. *In re TMI Cases Consolidated II*, 940 F.2d 832 (3d Cir. 1991), *cert. denied*, 503 U.S. 906 (1992); *O'Conner*, 13 F.3d 1090; *Nieman v NLO, Inc.*, 108 F.3d 1546 (6th Cir. 1997); *Roberts*, 146 F.3d 1305.[3] These

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3. Other court decisions involving the direct efforts of states to regulate the design, operations or effluent levels of a nuclear reactor are in accord. *See, e.g., Northern States Power Co. v. Minnesota*, 447 F.2d 1143, 1154 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972) (mem.) (federal government has exclusive authority to regulate construction and operation of nuclear power plant, including levels of effluent discharge); *Jersey Cent. Power & Light Co. v. Lacey Township*, 772 F.2d 1103, 1112 (3d Cir. 1985), *cert. denied*, 475 U.S. 1013 (1986) (federal law governs radiological safety aspects of nuclear power industry including the storage and shipment of spent fuel); *Long Island Lighting Co. v. County of Suffolk*, 628 F. Supp. 654, 665 (E.D.N.Y. 1986) (offsite testing of utility's radiological emergency response is within sphere of authority reserved for federal government).

permissible dose limits are determined by the NRC which has expertise in this field and authority to set safety standards. 10 C.F.R. § 1.11(b).

In *Pacific Gas*, this Court recognized the preemptive effect of fifty years of Congressional legislation and regulation of nuclear energy, and held that under the comprehensive federal framework, "the safety of nuclear technology [is] the exclusive business of the Federal Government," and that states are precluded from regulating the safety aspects of nuclear energy. 461 U.S. at 208. This Court reasoned:

> the Federal Government ***maintains complete control of the safety and "nuclear" aspects of energy generation*** . . . State safety regulation is not pre-empted only when it conflicts with federal law. Rather, the ***Federal Government has occupied the entire field of nuclear safety concerns,*** except the limited powers expressly ceded to the States . . . [A] ***state judgment that nuclear power is not safe enough to be further developed would conflict directly with the countervailing judgment of the NRC*** . . . A state prohibition on nuclear construction for safety reasons would also be in the teeth of the Atomic Energy Act's objective to insure that nuclear technology be safe enough for widespread development and use — and would be pre-empted for that reason.

Id. at 212-13.

One year later and four years before the 1988 Amendments Act, this Court held that the Atomic Energy Act, as it existed prior to the 1988 Amendments Act, did not preempt an award of punitive damages under state law despite the indirect

regulatory effect of such an award on the nuclear industry. *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984). Reaffirming its decision in *Pacific Gas* and examining the legislative history of the Price Anderson Act ***simply as an illustration***, this Court reasoned that although Congress prohibited the states from regulating nuclear safety, there was "ample evidence that Congress" intended to allow states to provide state law remedies to persons "suffering injuries from radiation in a nuclear plant." *Id.* at 250-51. Particularly persuasive to this Court was the fact that ***Congress had not provided any federal remedy for persons injured by radiation.*** This Court further reasoned that:

> ***Congress assumed that state-law remedies***, in whatever form they might take, ***were available*** to those injured by nuclear incidents . . . No doubt there is ***tension*** between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a State may nevertheless award damages based on its own law of liability. But . . . ***Congress intended to stand by both concepts and to tolerate whatever tension there was between them.*** We can do no less.

Id. at 256 (emphasis added).

In two dissenting opinions, which provided the road map for later legislation, the Chief Justice, and Justices Powell, Marshall, and Blackmun strongly disagreed with the majority's analysis that tolerated the "tension" between the preemption of nuclear safety and state punitive damage awards. Justice Blackmun wrote that the majority analysis "wrecks havoc with the regulatory structure that Congress carefully created." *Id.* at 259. Justice Powell criticized the majority opinion because it "authorizes lay juries and judges in each of the States to make regulatory judgments as to whether a federally licensed nuclear

facility is being operated safely." *Id.* at 274. Justice Powell argued that the federal regulations:

> constitute a uniform body of law carefully designed to balance safety and efficiency in nuclear facilities. . . . It is not reasonable to infer that Congress intended to allow juries of lay persons, selected essentially at random, to impose unfocused penalties solely for the purpose of punishment and some undefined deterrence. These purposes have wisely been left within the regulatory authority and discretion of the NRC.

Id. at 283. Justice Powell concluded that:

> this Court's decision will leave this area of the law in disarray. ***No longer can the operators of nuclear facilities rely on the regulations and oversight of the NRC.*** Juries unfamiliar with nuclear technology may be competent to determine and assess compensatory damages on the basis of liability without fault. They are unlikely, however, to have even the most rudimentary comprehension of what reasonably must be done to assure the safety of employees and the public.

Id. at 285 (emphasis added).

Four years later in 1988, agreeing with the policy analysis of the *Silkwood* dissents, Congress dramatically transformed the Price Anderson landscape and resolved the "tension" between the exclusive federal regulation of nuclear safety and state law compensation for injuries. *See O'Conner*, 13 F.3d at 1105 n.13. Congress enacted the Amendments Act and ***created the precise federal remedy for persons injured by radiation***

that the Silkwood majority had found missing. Accordingly, Congress' enactment of the Amendments Act sharply delineated the scope of field preemption and severely limited the precedential value of *Silkwood*. Thus, Petitioners' reliance on *Silkwood* is completely undermined. *See In re TMI*, 940 F.2d at 857-58.

Petitioners' reliance on 1984 *Silkwood* language to interpret the meaning of the 1988 Amendments Act fatally ignores the fact that *Silkwood* interpreted Price Anderson ***as it existed four years before the 1988 Amendments Act when Price Anderson did not contain the statutory language and federal cause of action at issue in this petition.*** *See O'Conner*, 13 F.3d at 1105 n.13 (*Silkwood's* holding was partially overruled by the Amendments Act; "any tension between federal standards and state liability is to be resolved so as to avoid inconsistency with the Price-Anderson Act."); *In re TMI*, 67 F.3d 1119, 1125 (3d Cir. 1995) (Congress "partially limited *Silkwood's* holding" in 1988); *Nieman*, 108 F.3d at 1552 (the Supreme Court "has not had occasion to address § 2014(hh), a provision added in the 1988 amendments . . . which clarified the relationship between state and federal law by explicitly incorporating state law into the Amendments Act except to the extent the state law is inconsistent . . . .").[4] Relying on *Silkwood*, Petitioners, in

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4. *Silkwood v. Kerr-McGee*, 464 U.S. 238 (1984) is further distinguishable on the following grounds. First, *Silkwood* did not even address the issue presented here: what is the standard of care in a PLA? *Silkwood* only addressed whether punitive damages in a state law cause of action were preempted by the Atomic Energy Act. Second, Petitioners fail to distinguish between remedies (such as punitive damages), causes of action (such as the PLA), and rules for decision (such as the duty owed), and thus, misread *Silkwood's* discussion of remedies as applying to causes of action and rules for decision. Third, *Silkwood* was a "diversity action" in federal district court based on common law tort principles under Oklahoma law, *Id.* at 243, and was not a Price Anderson

(Cont'd)

effect, contend that Congress intended to have the federal judiciary completely ignore the NRC established federal permissible dose limits in adjudicating a PLA and, instead, to rely upon diverse, inconsistent and unscientific state law dose limits determined by juries.

Lower and appellate court decisions on the applicable standard of care in public liability actions are in accord with this Court's total preemption of nuclear safety issues in *Pacific Gas*, *Silkwood*, and *English v. General Elec. Co.*, 496 U.S. 72 (1990). Eleven appellate and district courts, including the court below, have held that the federal dose limits constitute the applicable standard of care. *In re TMI*, 67 F.3d 1103 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1034 (1996); *O'Conner*, 13 F.3d 1090; *Roberts*, 1997 WL 382035; *McLandrich v. Southern California Edison Co.*, 942 F. Supp. 457 (S.D. Cal. 1996); *Smith v. General Elec. Co.*, 938 F. Supp. 70 (D. Mass. 1996); *Bohrmann v. Maine Yankee Atomic Power Co.*, 926 F. Supp. 211 (D. Me. 1996); *Corcoran v. New York Power Auth.*, 935 F. Supp. 376 (S.D.N.Y. 1996); *Whiting v. Boston Edison Co.*, 891 F. Supp. 12 (D. Mass. 1995); *O'Conner v. Commonwealth Edison*

(Cont'd)

case. *Id.* at 251. This case is a PLA to be decided under federal law. Fourth, it was undisputed that the federal regulations governing offsite exposure to plutonium were exceeded. *See Silkwood v. Kerr-McGee Corp.*, 485 F. Supp. 566, 583 (W.D. Okla. 1979) (Silkwood's exposure to plutonium in her apartment exceeded by two and a half times the exposure permitted), *aff'd in part and rev'd in part on other grounds*, 667 F.2d 908 (10th Cir. 1981), *rev'd*, 464 U.S. 238 (1984). Finally, *Silkwood's* dictum that ***compensatory damages*** do not conflict with the federal preemption of nuclear safety is a reference to the measure of compensatory damages for the injury suffered by the plaintiff. Compensatory damages say nothing about a defendant's conduct and are therefore irrelevant to the standard of care which controls the conduct of a defendant. The standard of care that is consistent with the federal preemption of nuclear safety, was not addressed in *Silkwood*.

Co., 748 F. Supp. 672, 675 (C.D. Ill. 1992), *aff'd*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 114 S. Ct. 2711 (1994); *Coley v. Commonwealth Edison Co.*, 768 F. Supp. 625 (N.D. Ill. 1991); *Hennessy v. Commonwealth Edison Co.*, 764 F. Supp. 495 (N.D. Ill. 1991). In *In re TMI*, the Third Circuit held that "[p]ermitting the states to apply their own nuclear regulatory standards, in the form of the duty owed by defendants in tort, would . . . frustrate the objectives of the federal law." 940 F.2d at 859 (quotation omitted).

> Under *Pacific Gas & Electric Co.*, states are preempted from imposing a non-federal duty in tort, because any state duty would infringe upon the pervasive federal regulation in the field of nuclear safety and, thus would conflict with federal law.

Id. (*citing Pacific Gas*, 461 U.S. at 204). The Third Circuit expressly recognized that tort law standards either stricter or more lenient than the federal regulatory standards were preempted:

> The result [conflict with federal law] is the same regardless of whether the state adopts stricter or more lenient safety standards. If stricter standards are imposed, the state will create a disincentive to nuclear power that is in conflict with federal law. If more lenient standards are imposed, the state will undercut federal safety efforts.

Id. 860 n.22.[5]

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5. *See also Akins v. Sacramento Municipal Utility District*, 8 Cal. Rptr. 2d 785 (1992), *rev. dismissed*, 868 P.2d 905 (1994), in which the court concluded that public liability claims based on exposure to radiation from the discharge of effluent from a nuclear power plant were "barred by federal preemption." *Id.* at 804. As stated in *Akins*:

(Cont'd)

The federal regulation of radiation exposures to nuclear workers or neighbors of a nuclear power plant is at the very core of the area which this Court has determined is within the exclusive authority of the federal government. The Seventh Circuit's analysis draws directly from this precedent, citing "uncontradicted statements by the Supreme Court that federal nuclear safety regulations preempt all state safety regulations." 13 F.3d at 1104. Relying on *Pacific Gas*, 461 U.S. at 208 ("the safety of nuclear technology was the exclusive business of the Federal Government"), and *Silkwood*, 464 U.S. at 240-41 (addressing "foreclosure of the States from conditioning the operation of nuclear plants on compliance with state imposed safety standards"), the Seventh Circuit

> agree[d] with the Third Circuit in *TMI* that it is clear from *Pacific Gas* and from *Silkwood* that state regulation of nuclear safety, through either legislation or negligence actions, is preempted by federal law.

(Cont'd)

> [A] claim that mere potential exposure at levels below federal radiation protection standards creates a sufficiently unreasonable risk of harm to support compensation for the exposure itself "would conflict directly with the countervailing judgment of the NRC" and "would also be in the teeth of the Atomic Energy Act's objective to insure that nuclear technology be safe enough for widespread development and use," and would accordingly fall within matters foreclosed to the states.

Id. at 805 (*quoting Pacific Gas*, 461 U.S. at 213). The court in *Akins* concluded that "federal safety regulations establish the duty element of a state tort cause of action and . . . there can be no liability in the absence of a violation of federal standards." *Id.* at 805 (*citing In re TMI*, 940 F.2d at 859-60).

O'Conner, 13 F.3d at 1105 (*citing In re TMI*, 940 F.2d at 858). It concluded, as did the Third Circuit, that

> states are preempted from imposing a non-federal duty in tort, because any state duty would infringe upon pervasive federal safety regulations in the field of nuclear safety, and thus would conflict with federal law.

Id. (*quoting In re TMI*, 940 F.2d at 859).

The Eleventh Circuit's decision is not in conflict with any of the foregoing decisions. The preemption issue is settled in this Court, and the decision below raises no novel or difficult preemption question requiring review by this Court. Indeed, "virtually every federal court to consider the issue . . . held that federal regulations must provide the sole measure of the defendants' duty in a public liability cause of action." *Roberts*, 146 F.3d at 1308.

2. The Decision Below Properly Applied The Rule for Decision Analysis Mandated By The Price-Anderson Act; It Is Not In Conflict With The Statutory Text.

In addition to its conclusion that federal safety regulations must apply in this tort action as a result of federal preemption, the Eleventh Circuit concluded that the rules for decision analysis mandated by the Price-Anderson Act also requires application of the federal regulations as the standard of care. This conclusion is entirely consistent with the statutory directive of the Act and other public liability cases applying the Act. It raises neither a novel question of statutory construction nor a conflict with the statutory text warranting this Court's review.

In the Amendments Act, Congress broadly defined "public liability action" to mean "***any*** suit asserting public liability,"

§ 2014(hh), and defined "public liability" to mean "***any*** legal liability arising out of or resulting from a nuclear incident. . . ." 42 U.S.C. § 2014(w) (emphasis added). Congress then broadly defined "nuclear incident" to include:

> ***any*** occurrence, including an extraordinary nuclear occurrence, . . . causing . . . bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material.

42 U.S.C. § 2014(q) (emphasis added). Further, Congress provided that a "public liability action shall be deemed to be an action arising under section 2210 of this title. . . ." 42 U.S.C. § 2014(hh).

By defining public liability so broadly as to include "***any*** legal liability" Congress preempted all state causes of action for damages arising from nuclear materials. *In re TMI*, 940 F.2d at 854. Thus, the Third, Sixth, and Seventh Circuits have held:

> after the Amendments Act, ***no state cause of action based upon public liability exists.*** A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or ***it is not compensable at all***.

Id. (emphasis added); *O'Conner*, 13 F.3d at 1099-1100 ("a new federal cause of action supplants the prior state cause of action."); *Nieman*, 108 F.3d at 1553 ("state law claims cannot stand as separate causes of action. [Plaintiff] can sue under the Price-Anderson Act as amended or not at all."); *see also* 141 Cong. Rec. S10185-01, S10185-86 (daily ed. July 18, 1995).

Contrary to its plain language, Petitioners erroneously argue that § 2014(hh) should be read as if it directed federal courts to ***adopt*** the law of the State unless such law is inconsistent with ***various provisions in section 2210.*** Petition, at 8-9. When Congress created the PLA, it specifically labeled that action in the singular, and clearly established one cause of action only: "***A*** public liability ***action*** shall be deemed to be ***an action*** arising under . . . and the substantive rules for decision in ***such action***. . . ." 42 U.S.C. § 2014(hh) (emphasis added). Thus, the statutory language allows for only one cause of action: the PLA. There is no other, and Petitioners' contention that a state "substantive rule for decision" allows ***another state law cause of action,*** is plainly inconsistent with § 2014(hh). Petition, at 9, 24-25. Further, state law causes of action are not "rules for decision." They are totally ***different causes of action***, which have been supplanted by the PLA.

Since the PLA is the ***sole*** federal cause of action authorized by Congress, there cannot also be a ***different*** state cause of action by which a plaintiff can obtain recovery. *See In re TMI*, 940 F.2d at 854 ("the consequence of a determination that a particular Plaintiff has failed to state a public liability claim is that he has no such claim at all."); *O'Conner*, 13 F.3d at 1100.

In addition to preempting all state law causes of action, Congress also preempted state law rules for decision that are "***inconsistent***" with the Price Anderson Act.[6] 42 U.S.C.

6. The core of the 1988 Amendments Act was section 2210, which is why the original text of the amendment referred to section 2210 rather than to the act as a whole or to the statutory framework. However, once an amendment is passed it becomes a part of the act it amends so that the phrase "unless inconsistent with" refers to the entire act and to the statutory framework and case law in existence. Congress would not have intended to create a new federal cause of action that would use rules for decision which were inconsistent with the total federal preemption of nuclear safety and its effectuation through NRC established permissible doses.

§ 2014(hh) (emphasis added). After creating the exclusive PLA, Congress did not go on to provide a "complete and self-sufficient body of federal law" to be applied in a PLA. *In re TMI*, 940 F.2d at 854. But Congress rarely does so. *Id.* That Congress chose to ***derive*** federal law from state law does not mean that state law is unaltered, as Petitioners erroneously contend. Rather, the "Price-Anderson system, by design, alters state tort law to forward the goals of that act." *Nieman*, 108 F.3d at 1552 (*quoting O'Conner*, 13 F.3d at 1100). In amending the Price Anderson Act,[7] Congress was well aware that the Price Anderson compensation system must operate as a consistent part of a larger federal framework governing the safe use of nuclear energy. *O'Conner*, 13 F.3d at 1100 ("Congress recognized that state law would operate in the context of a complex federal scheme which would mold and shape any cause of action grounded in state law."); *id.* at 1105 (Price Anderson operates within "a stringent regulatory background."). The "federal nuclear safety regulations," including the permissible dose limits established by 10 C.F.R. § 20.101, "are a part of this" larger federal framework. *O'Conner*, 13 F.3d at 1105. Congress is presumed to know existing law pertinent to the legislation it enacts. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). Congress was not required to repeat in the Amendments Act every regulation or judicial determination that it knew had already been enacted or decided. It knew that "[n]umerous federal questions will necessarily arise in the course of litigation under this Act, which questions must be resolved consistently with the pervasive federal scheme." *O'Conner v. Commonwealth Edison Co.*, 770 F. Supp. 448, 454 (C.D. Ill. 1991), *aff'd*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 114 S. Ct. 2711 (1994).

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7. Approximately every ten years since enacting Price Anderson Act, Congress has amended it, continually building a comprehensive federal structure that has governed and regulated the nuclear industry. *In re TMI*, 940 F.2d at 852-53.

By directing federal courts to "derive" federal rules for decision only from state law that is consistent with existing federal regulatory and statutory law, Congress delineated the scope of field preemption, and set the entire preexisting federal framework ***it had already erected*** as the polestar by which the federal judiciary should be guided as it establishes this new body of federal law interpreting the PLA. *In re TMI*, 940 F.2d at 854; *O'Conner*, 13 F.3d at 1105; *Nieman*, 108 F.3d at 1552; *O'Conner*, 748 F. Supp. at 678. In *O'Conner*, the Seventh Circuit confirmed that the existing federal framework was the standard by which the consistency of state rules for decision must be measured:

> [W]e must look at the Amendments Act ***in the context of the entire federal statutory scheme*** on nuclear power. The Amendments Act is simply the ***last addition*** to the federal law of nuclear energy ***that has been evolving*** since 1946 when Congress enacted the Atomic Energy Act. . . . Thus, the Amendments Act is the ***latest installment in nearly fifty years of congressional work.*** During that time, Congress has attempted to encourage the development of domestic nuclear power to the fullest extent through licensing, indemnification, limitation of liability, and consolidation of litigation. Nevertheless, Congress has balanced this encouragement of private sector activity with an acute concern for public safety by authorizing extensive regulation first by the Atomic Energy Commission, and now by the Nuclear Regulatory Commission, and by imposing a carefully constructed measure of liability should nuclear accidents occur.

O'Conner, 13 F.3d at 1095-97 (emphasis added). Thus, the phrase "unless inconsistent with" explicitly defers to federal regulation, and makes federal law supreme.

Petitioners focus on the phrase "such section" contained in § 2014(hh) and argue that it narrowly refers only to the insurance and indemnification provisions of § 2210. Petition, at 14. But § 2210 does far more than Petitioners admit. In fact, § 2210 is the basis of federal jurisdiction for the PLA. 42 U.S.C. § 2014(hh) (A PLA "shall be deemed to be an action arising under section 2210. . . ."); *O'Conner*, 13 F.3d at 1100. Congress enacted the Amendments Act in the context of an extensive body of law that included case law recognizing the total field preemption of nuclear safety (*e.g.*, *Pacific Gas*), and a precise federal regulatory structure (*e.g.*, 10 C.F.R. § 20.101). *Id.* at 1095, 1105. Moreover, both the legislative history and case law interpret the phrase "such section" as referring to the entire Price Anderson Act. *See e.g.*, *Id.* at 1100 and *In re TMI*, 940 F.2d at 856 (both *citing* H.R. Rep. No. 104, 100th Cong., 1st Sess., pt 1 at 18 ("unless such law is inconsistent with the *Price Anderson Act.*")); *In re TMI*, 67 F.3d at 1123 (interpreting "such section" as the "Price Anderson Act"); *Nieman*, 108 F.3d at 1552 (considering whether plaintiff's claim was inconsistent with "the Price-Anderson Act" in section of opinion entitled "Consistency with Price-Anderson Act."); *O'Conner*, 13 F.3d at 1101 ("courts will be required to determine whether state law principles conflict with other parts of the Price-Anderson scheme.").

Even if the phrase "such section" refers only to language found in § 2210, that section itself explicitly and implicitly incorporates and defers to the existing federal regulatory framework. For example, § 2210(a) requires each licensee to carry "financial protection of such type and amounts as the [NRC] . . . in the exercise of its licensing and regulatory authority and responsibility shall require . . ." Thus, in § 2210(a), Congress expressly deferred to the ***NRC's regulatory control over nuclear plants.*** *See also* S. Rep. No. 296, 85th Cong., 1st Sess., *reprinted in* 1957 U.S. Code Cong. & Admin.

News 1803, 1819 (leaving the ***control*** over misconduct to the ***NRC licensing process***); 133 Cong. Rec. H. 6815 (July 30, 1987) (statement of Mr. Udall reading letter of Secretary of Energy) (excluding penalties from the Act since ***federal regulations will control conduct***). The Amendments Act, therefore, incorporates that deference and recognizes that any rules for decision cannot be derived from state law unless such rules are consistent with NRC regulatory control. *See In re TMI*, 940 F.2d at 859 ("Permitting the states to apply their own nuclear regulatory standards, in the form of the duty owed by nuclear defendants in tort, would, however, 'frustrate the objectives of the federal law.'").

Section 2210(a) further requires as a condition of a license, each licensee to have and maintain financial protection "for the public purposes cited in § 2012(I)." In § 2012(I), Congress declared its policy to "protect the health and safety of the public and to encourage the development of the atomic energy industry, in the interest of the general welfare. . . ." This policy is accomplished through the NRC permissible dose limits which provide a licensee with "a clear statement regarding how it may limit a worker's dose ***without exposing the worker to injury or itself to liability***." *O'Conner*, 748 F. Supp. at 678 (emphasis added). *See also O'Conner*, 13 F.3d at 1103 (the federal safety regulations "require strict adherence so that workers and the public are protected, and so that public utilities are not exposed to liability when workers receive noninjurious doses of radiation."); *In re TMI*, 67 F.3d at 1115 (a numerical dose limit "protects the public and provides [licensees] with a definitive standard by which their conduct will be measured.").

To accomplish the public purposes cited in § 2012(I), Congress gave the NRC authority to regulate nuclear materials to protect "public health and safety." 10 CFR § 1.11(b). Based on the scientific research on radiation effects performed by

scientific organizations such as the National Council on Radiation Protection and Measurements ("NCRP"), the International Commission on Radiological Protection ("ICRP"), the United Nations Committee on the Effects of Atomic Radiation ("UNSCEAR"), and the National Academy of Sciences Committee on the Biological Effects of Ionizing Radiation ("BEIR"),[8] the NRC promulgates radiation safety standards to protect nuclear workers from the potentially harmful effects of high levels of radiation and to establish the permissible radiation doses that can safely be received by nuclear workers and members of the public. 10 C.F.R. §§ 20.101; 20.103; 20.105; 20.106; *O'Conner*, 748 F. Supp. at 678. Thus, the phrase "such section" explicitly and implicitly embodies the entire federal framework governing nuclear safety, including the permissible dose limits.

Petitioners' contention that Congress did not intend to include the work of the NRC as part of its reference to § 2210 is contradicted by counting the fifty-seven times the words "Nuclear Regulatory Commission" or "Commission" are actually used in § 2210. Congress was well aware of the NRC's work in effectuating the federal preemption of nuclear safety and intended to bring the NRC safety standards into the Price Anderson Act, specifically as a standard against which the new rules for decision must be measured to ensure consistency with the federal framework governing nuclear safety. *O'Conner*, 13 F.3d at 1105.

Under the rules for decision analysis, "a clear statutory prescription," *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977), or "a direct conflict," *Florida Lime & Avocado Growers, Inc.*

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8. *O'Conner v. Commonwealth Edison Co.*, 807 F. Supp. 1376, 1382 nn.3-6 (C.D. Ill. 1992), *aff'd*, 13 F.3d 1090 (7th Cir.), *cert. denied*, 114 S. Ct. 2711 (1994) (discussing historical background and scientific reliability of these organizations).

v. Paul, 373 U.S. 132, 142-43 (1963), between the federal and state standards is not required. In *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), this Court explained:

> The conflict with federal policy need not be as sharp as that which must exist for ordinary preemption when Congress legislates "in a field which the States have traditionally occupied." . . . Or to put the point differently, the fact that the area in question ***is*** one of unique federal concern changes what would otherwise be a conflict that cannot produce preemption into one that can.

Id. at 507-508 (citation omitted; emphasis in original).

Both the public liability action and the issue of nuclear safety are areas of "unique federal concern." *Id.* at 508. Indeed, the ***only*** means by which anyone claiming to have been injured as a result of a "nuclear incident" may obtain compensation is through the federal PLA. *In re TMI*, 940 F.2d at 854 ("After the Amendments Act, no state cause of action based upon public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or ***it is not compensable at all***.") (emphasis in original). Congress has delegated issues of nuclear safety to the NRC, which in turn has established permissible doses that balance safety with the need to have work performed in radiation areas if the industry is to operate. Permissible doses must mean that a plant operator can allow workers to receive such doses without liability. Otherwise, they would not be permissible at all. Congress could not have intended to authorize the NRC to establish permissible doses and then to have created a federal cause of action for such permissible doses.

The Seventh Circuit reasoned:

> Imposing a standard of care other than the federal regulations would disturb the carefully crafted balance between private involvement and safety that Congress has achieved. Thus, the application of something other than the federal safety regulations as a standard of care is inconsistent with the Price-Anderson scheme and consequently cannot be applied in a public liability action.

O'Conner, 13 F.3d at 1105.[9] The Eleventh Circuit agreed:

> Moreover, the federal statutory scheme limits the liability of operators of nuclear power facilities and provides for indemnification but does so against a stringent regulatory background. Therefore, as the Seventh Circuit Court of Appeals noted, "[i]mposing

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9. Lower courts that have engaged in the "consistency" analysis required by 42 U.S.C. § 2014(hh) have come to the same conclusion. *In re TMI Litigation Cases Consolidated II*, No. 88-1452 (M.D. Pa. Feb. 18, 1994) (both the statutory mandate in 42 U.S.C. § 2014(hh), and preemption analysis, require that any state standard of care yield to the federal regulation); *Coley v. Commonwealth Edison*, 768 F. Supp. 625, 629 (N.D. Ill. 1991) ("a . . . state rule setting a broader standard of care could disturb the regulatory scheme established to balance the need for protection and clarity. Since the regulatory scheme governing the nuclear power industry indicates a paramount federal interest, such a state rule must be rejected as contrary to the Price-Anderson Act."); *O'Conner*, 748 F. Supp. at 678 ("if application of Illinois law does not result in the adoption of the federal permissible dose limits as the duty owed by the Defendants . . . Illinois law would be inconsistent with federal law and that federal law would have to take precedence."); *Hennessy v. Commonwealth Edison Co.*, 764 F. Supp. 495, 501 (N.D. Ill. 1991) (following *O'Conner*).

> a standard of care other than the federal regulations would disturb the carefully crafted balance between private involvement and safety that Congress has achieved."

Roberts, 146 F.3d at 1308 (citation omitted).

The Eleventh Circuit's conclusion that a state standard contrary to the federal regulations would upset the Act's careful balance between the dual goals of public protection and nuclear development that Congress has achieved in the development of the Atomic Energy Act and the Price-Anderson amendments thereto is entirely consistent with existing precedent and the statutory directive. The issue has been well settled by the decisions of this Court (*see, e.g., Duke Power*, 438 U.S. at 83 (purpose of Price-Anderson Act was to "stimulate the private development of electric energy by nuclear power while simultaneously providing the public compensation in the event of a catastrophic nuclear incident")), and presents no conflict among any of the courts which have addressed it. The question is not worthy of this Court's review.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

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APPENDIX

APPENDIX A — STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 2012

42 U.S.C. § 2012. Congressional findings

The Congress of the United States makes the following findings concerning the development, use, and control of atomic energy:

(a) The development, utilization, and control of atomic energy for military and for all other purposes are vital to the common defense and security.

(b) Repealed. Publ. L. 88-489, § 1, Aug. 26, 1964, 78 Stat. 602.

(c) The processing and utilization of source, byproduct, and special nuclear material affect interstate and foreign commerce and must be regulated in the national interest.

(d) The processing and utilization of source, byproduct, and special nuclear material must be regulated in the national interest and in order to provide for the common defense and security and to protect the health and safety of the public.

(e) Source and special nuclear material, production facilities, and utilization facilities are affected with the public interest, and regulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is necessary in the national interest to assure the common defense and security and to protect the health and safety of the public.

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(f) The necessity for protection against possible interstate damage, occurring from the operation of facilities for the production or utilization of source or special nuclear material places the operation of those facilities in interstate commerce for the purposes of this chapter.

(g) Funds of the United States may be provided for the development and use of atomic energy under conditions which will provide for the common defense and security and promote the general welfare.

(h) Repealed. Pub. L. 88-489, § 2, Aug. 26, 1964, 78 Stat. 602.

(i) In order to protect the public and to encourage the development of the atomic energy industry, in the interest of the general welfare and of the common defense and security, the United Status may make funds available for a portion of the damages suffered by the public from nuclear incidents, and may limit the liability of those persons liable for such losses.

42 U.S.C. § 2014

42 U.S.C. § 2014. Definitions

The intent of Congress in the definitions as given in this section should be construed from the words or phrases used in the definitions. As used in this chapter:

(a) The term "agency of the United States" means the executive branch of the United States, or any Government agency, or the legislative branch of the United States, or any agency, committee, commission, office, or other establishment

in the legislative branch, or the judicial branch of the United States, or any office, agency, committee, commission, or other establishment in the judicial branch.

(b) The term "agreement for cooperation" means any agreement with another nation or regional defense organization authorized or permitted by sections 2074, 2077, 2094, 2112, 2121(c), 2133, 2134, or 2164 of this title, and made pursuant to section 2153 of this title.

(c) The term "atomic energy" means all forms of energy released in the course of nuclear fission or nuclear transformation.

(d) The term "atomic weapon" means any device utilizing atomic energy, exclusive of the means for transporting or propelling the device (where such means is a separable and divisible part of the device), the principal purpose of which is for use as, or for development of, a weapon, a weapon prototype, or a weapon test device.

(e) The term "byproduct material" which means, (1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.

(f) The term "Commission" means the Atomic Energy Commission.

(g) The term "common defense and security" means the common defense and security of the United States.

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(h) The term "defense information" means any information in any category determined by any Government agency authorized to classify information, as being information respecting, relating to, or affecting the national defense.

(i) The term "design" means (1) specifications, plans, drawings, blueprints, and other items of like nature; (2) the information contained therein; or (3) the research and development data pertinent to the information contained therein.

(j) The term "extraordinary nuclear occurrence" means any event causing a discharge or dispersal of source, special nuclear, or byproduct material from its intended place of confinement in amounts offsite, or causing radiation levels offsite, which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines to be substantial, and which the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, determines has resulted or will probably result in substantial damages to persons offsite or property offsite. Any determination by the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, that such an event has, or has not, occurred shall be final and conclusive, and no other official or any court shall have power or jurisdiction to review any such determination. The Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, shall establish criteria in writing setting forth the basis upon which such determination shall be made. As used in this subsection, "offsite" means away from "the location" or "the contract location" as defined in the applicable Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, indemnity agreement, entered into pursuant to section 2210 of this title.

Appendix A

(k) The term "financial protection" means the ability to respond in damages for public liability and to meet the costs of investigating and defending claims and settling suits for such damages.

(l) The term "Government agency" means any executive department, commission, independent establishment, corporation, wholly or partly owned by the United States of America which is an instrumentality of the United States, or any board, bureau, division, service, office, officer, authority, administration, or other establishment in the executive branch of the Government.

(m) The term "indemnitor" means (1) any insurer with respect to this obligation under a policy of insurance furnished as proof of financial protection; (2) any licensee, contractor or other person who is obligated under any other form of financial protection, with respect to such obligations; and (3) the Nuclear Regulatory Commission or the Secretary of Energy, as appropriate, with respect to any obligation undertaken by it in indemnity agreement entered into pursuant to section 2210 of this title.

(n) The term "international arrangement" means any international agreement hereafter approved by the Congress or any treaty during the time such agreement or treaty is in full force and effect, but does not include any agreement for cooperation.

(o) The term "Joint Committee" means the Joint Committee on Atomic Energy.

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(p) The term "licensed activity" means an activity licensed pursuant to this chapter and covered by the provisions of section 2210(a) of this title.

(q) The term "nuclear incident" means any occurrence, including an extraordinary nuclear occurrence, within the United States causing, within or outside the United States, bodily injury, sickness, disease, or death, or loss of or damage to property, or loss of use of property, arising out of or resulting from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or byproduct material: *Provided, however* That as the term is used in section 2210(l) of this title, it shall include any such occurrence outside the United States: *And provided further*, That as the term is used in section 2210(c) of this title, it shall include any such occurrence outside both the United States and any other nation if such occurrence arises out of or results from the radioactive, toxic, explosive, or other hazardous properties of source, special nuclear, or by-product material licensed pursuant to subchapters, V, VI, VII, and IX of this chapter, which is used in connection with the operation of a licensed stationary production or utilization facility or which moves outside the territorial limits of the United States in transit from one person licensed by the Nuclear Regulatory Commission to another person licensed by the Nuclear Regulatory Commission.

(r) The term "operator" means any individual who manipulates the controls of a utilization or production facility.

(s) The term "person" means (1) any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the Commission, any State or any political subdivision of, or

any political entity within a State, any foreign government or nation or any political subdivision of any such government or nation, or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing.

(t) The term "person indemnified" means (1) with respect to a nuclear incident occurring within the United States or outside the United States as the term is used in section 2210(c) of this title, and with respect to any nuclear incident in connection with the design, development, construction, operation, repair, maintenance or use of the nuclear ship Savannah, the person with whom an indemnity agreement is executed or who is required to maintain financial protection, and any other person who may be liable for public liability or (2) with respect to any other nuclear incident occurring outside the United States, the person with whom an indemnity agreement is executed and any other person who may be liable for public liability by reason of his activities under any contract with the Secretary of Energy or any project to which indemnification under the provisions of section 2210(d) of this title has been extended or under any subcontract, purchase order, or other agreement, or any tier, under any such contract or project.

(u) The. term "produce," when used in relation to special nuclear material, means (1) to manufacture, make, produce, or refine special nuclear material; (2) to separate special nuclear material from other substances in which such material may be contained; or (3) to make or to produce new special nuclear material.

(v) The term "production facility" means (1) any equipment or device determined by rule of the Commission to

be capable of the production of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.

(w) The term "public liability" means any legal liability arising out of or resulting from a nuclear incident or precautionary evacuation (including all reasonable additional costs incurred by a State, or a political subdivision of a State, in the course of responding to a nuclear incident or a precautionary evacuation), except: (i) claims under State or Federal workmen's compensation acts of employees of persons indemnified who are employed at the site of and in connection with the activity where the nuclear incident occurs; (ii) claims arising out of an act of war; and (iii) whenever used in subsections (a), (c), and (k) of section 2210 of this title, claims for loss of, or damage to, or loss of use of property which is located at the site of and used in connection with the licensed activity where the nuclear incident occurs. "Public liability" also includes damage to property of persons indemnified: *Provided*, That such property is covered under the terms of the financial protection required, except property which is located at the site of and used in connection with the activity where the nuclear incident occurs.

(x) The term "research and development" means (1) theoretical analysis, exploration, or experimentation; or (2) the extension of investigative findings and theories of a scientific or technical nature into practical application for experimental and demonstration purposes, including the experimental production and testing of models, devices, equipment, materials, and processes.

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(y) The term "Restricted Data" means all data concerning (1) design, manufacture, or utilization of atomic weapons; (2) the production of special nuclear material; or (3) the use of special nuclear material in the production of energy, but shall not include data declassified or removed from the Restricted Data category pursuant to section 2162 of this title.

(z) The term "source material" means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

(aa) The term "special nuclear material" means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

(bb) The term "United States" when used in a geographical sense includes all territories and possessions of the United States, the Canal Zone and Puerto Rico.

(cc) The term "utilization facility" means (1) any equipment or device, except an atomic weapon, determined by rule of the Commission to be capable of making use of special nuclear material in such quantity as to be of significance to the common defense and security, or in such manner as to affect the health and safety of the public, or peculiarly adapted for making use of atomic energy in such quantity as to be of

significance to the common defense and security, or in such manner as to affect the health and safety of the public; or (2) any important component part especially designed for such equipment or device as determined by the Commission.

(dd) The terms "high level radioactive waste" and "spent nuclear fuel" have the meanings given such terms in section 10101 of this title.

(ee) The term "transuranic waste" means material contaminated with elements that have an atomic number greater than 92, including neptunium, plutonium, americium, and curium, and that are in concentrations greater than 10 nanocuries per gram, or in such other concentrations as the Nuclear Regulatory Commission may prescribe to protect the public health and safety.

(ff) The term "nuclear waste activities", as used in section 2210 of this title, means activities subject to an agreement of indemnification under subsection (d) of such section, that the Secretary of Energy is authorized to undertake, under this chapter or any other law, involving the storage, handling, transportation, treatment, or disposal of, or research and development on, spent nuclear fuel, high-level radioactive waste, or transuranic waste, including (but not limited to) activities authorized to be carried out under the Waste Isolation Pilot Project under section 213 of Public Law 96-164 (93 Stat. 1265).

(gg) The term "precautionary evacuation" means an evacuation of the public within a specified area near a nuclear facility, or the transportation route in the case of an accident involving transportation of source material, special nuclear

material, byproduct material, high-level radioactive waste, spent nuclear fuel, or transuranic waste to or from a production or utilization facility, if the evacuation is —

(1) the result of any event that is not classified as a nuclear incident but that poses imminent danger of bodily injury or property damage from the radiological properties of source material, special nuclear material, byproduct material, high-level radioactive waste, spent nuclear fuel, or transuranic waste, and causes of evacuation; and

(2) initiated by an official of a State or a political subdivision of a State, who is authorized by State law to initiate such an evacuation and who reasonably determined that such an evacuation was necessary to protect the public health and safety.

(hh) The term "public liability action", as used in section 2210 of this title, means any suit asserting public liability. A public liability action shall be deemed to be an action arising under section 2210 of this title, and the substantive rules for decision in such action shall be derived from the law of the State in which the nuclear incident involved occurs, unless such law is inconsistent with the provisions of such section.

(jj)[1] LEGAL COSTS. — As used in section 2210 of this title, the term "legal costs" means the costs incurred by a plaintiff or a defendant in initiating, prosecuting, investigation, settling, or defending claims or suits for damage arising under such section.

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1. So in original. There is no subsec. (ii).

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10 C.F.R. § 20.101

10 C.F.R. § 20-101 Radiation dose standards for individuals in restricted areas.

(a) In accordance, with the provisions of § 20.102(a), and except as provided in paragraph (b) of this section, no licensee shall possess, use, or transfer licensed material in such a manner as to cause any individual in a restricted area to receive in any period of one calendar quarter from radioactive material and other sources of radiation a total occupational dose in excess of the standards specified in the following table:

REMS PER CALENDAR QUARTER

1. Whole body; head and trunk; active blood-forming organs; lens of eyes; or gonads 1¼
2. Hands and forearms; feet and ankles 18¾
3. Skin of whole body 7½

(b) A licensee may permit an individual in a restricted area to receive a total occupational dose to the whole body greater than that permitted under paragraph (a) of this section, provided:

(1) During any calendar quarter the total occupational dose to the whole body shall not exceed 3 rems; and

(2) The dose to the whole body, when added to the accumulated occupational dose to the whole body, shall not exceed 5 (N-18) rems where "N" equals the individual's age in years at his last birthday; and

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(3) The licensee has determined the individual's accumulated occupational dose to the whole body on Form NRC-4, or on a clear and legible record containing all the information required in that form; and has otherwise, complied with the requirements of § 20.102. As used in paragraph (b), "Dose to the whole body" shall be deemed to include any dose to the whole body, gonads, active blood-forming organs, head and trunk, or lens of eye.